

Editor's note: 91 I.D. 197; Reconsideration denied by Order dated May 24, 1984; Modified to the extent inconsistent -- 88 IBLA 224, 92 I.D. 263 (Aug. 29, 1985) -- See 88 IBLA 224 for litigation history.

JAMES E. LEBER

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

IBLA 83-867

Decided April 24, 1984

Interlocutory appeal from ruling of Administrative Law Judge Joseph E. McGuire denying motion to dismiss application for review of alleged discriminatory action. CH 3-2-D.

Reversed and remanded to the Hearings Division.

1. Surface Mining Control and Reclamation Act of 1977:
Discrimination: Generally--Surface Mining Control and Reclamation
Act of 1977: Employee Protection: Generally

Sec. 703 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1293 (1982), prohibits any "person" from discriminating against any employee by reason of his involvement in any proceeding under the Act. An aggrieved employee may file an application for review of any such discrimination with the Department of the Interior. For purposes of sec. 703 employee protection proceedings, the state agency charged with enforcement of the Act is not deemed a person within the meaning of the statute where review of alleged discriminatory action is sought by one of its employees.

APPEARANCES: John W. Carroll, Esq., Assistant Chief Counsel, Harrisburg, Pennsylvania, and
William F. Larkin, Esq., Pittsburgh, Pennsylvania, for

Pennsylvania Department of Environmental Resources; Robert P. Ging, Jr., Esq., Pittsburgh, Pennsylvania, for James E. Leber; Ronald J. Rademacher, Esq., and Anna M. Norton, Esq., Office of the Solicitor, Pittsburgh, Pennsylvania, for amicus curiae.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This proceeding was initiated by James E. Leber (Leber) through the filing of an application for review of alleged discriminatory actions committed against him by his employer, the Pennsylvania Department of Environmental Resources (PDER). The application was filed pursuant to section 703 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA, Act), 30 U.S.C. § 1293 (1982), and the regulations at 30 CFR Part 865. Leber represented in his application that he had been subjected to disciplinary action in his job as a result of his aggressive enforcement of the surface mining law. Specifically mentioned was a suspension without pay resulting from an incident involving his work as a mine inspector. ^{1/} Also mentioned were "punitive transfers." These actions were alleged to be discriminatory in that they were in retaliation for his aggressive investigation and enforcement activities, as well as for his report of alleged illegal activity by one of his supervisors. Leber's application for temporary relief, filed May 23, 1983, alleged discriminatory actions by his employer including, inter alia, increased work hours in excess

^{1/} This disciplinary suspension of Leber without pay was the subject of an appeal by Leber to the Pennsylvania Civil Service Commission. After hearing, the commission upheld the suspension in an opinion from which one commissioner dissented (Exhibit B, brief of amicus curiae). On July 19, 1983, counsel for Leber and counsel for PDER stipulated that the suspension of Leber would no longer be part of Leber's application for review.

of state regulations, changes in work assignments, downgraded performance evaluations, and overtime assignments.

Pursuant to the application for review, a hearing was held before Administrative Law Judge Joseph E. McGuire from July 19 through July 22, 1983, in Pittsburgh, Pennsylvania. Counsel for PDER made a motion before the Administrative Law Judge to dismiss the application on the ground that PDER was not a "person" within the meaning of the applicable statute, section 701(19) of SMCRA, 30 U.S.C. § 1291(19) (1982), and that it was, therefore, not subject to the jurisdiction of the administrative agency for purposes of a section 703 proceeding. The motion to dismiss was denied by Judge McGuire.

Subsequently, at the close of the hearing, counsel moved that the issue of whether PDER came within the statutory definition of a person be certified to the Board as an interlocutory appeal. This motion was also denied by the Administrative Law Judge. Thereafter, counsel petitioned the Board, pursuant to 43 CFR 4.1272, for permission to pursue an appeal of the interlocutory ruling of the Administrative Law Judge that PDER is a person for purposes of section 703 of SMCRA and 30 CFR Part 865, relating to protection against discriminatory action by employers. The petition was granted by order of this Board dated September 9, 1983.

Counsel for appellant, PDER, asserts in the statement of reasons for appeal that the Commonwealth of Pennsylvania and its agencies are not within the scope of the definition of a "person" under section 701(19) of SMCRA and, hence, that PDER is not a proper party respondent in an employee protection

proceeding under section 703 of SMCRA. Counsel further contends that interpreting section 703 of SMCRA to regulate PDER would be violative of the Tenth Amendment to the United States Constitution. 2/

Counsel for Leber contends in his brief that PDER is a person for purposes of employee protection proceedings under section 703 of the Act. Counsel cites the regulation at 30 CFR 700.5 which includes state agencies within the definition of a person under SMCRA. Further, counsel for Leber argues that employee protection proceedings under section 703 are not violative of the Tenth Amendment, where PDER is the employer, since the Commonwealth has voluntarily decided to participate in the regulation of surface mining operations in Pennsylvania under the Act, which the Federal Government would otherwise regulate independently.

The Office of the Solicitor has filed an amicus curiae brief in this proceeding. The Solicitor argues that a section 703 employee protection proceeding does not arise against the Commonwealth of Pennsylvania where the alleged discrimination arises from disciplinary action. 3/ This result is compelled, the Solicitor asserts, by the statutory and regulatory definition of a "person" under the Act.

2/ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3/ We note that this is contrary to the position initially taken by the Solicitor prior to the hearing before Judge McGuire, viz., that PDER constitutes a "person" subject to an employee protection proceeding under section 703. This position was detailed in an attachment to an Apr. 7, 1983, letter to counsel for Leber and Douglas R. Blazey, Chief Counsel, PDER.

[1] Section 703(a) of SMCRA provides protection for employees against discrimination resulting from involvement in proceedings under the Act:

Sec. 703.(a) No person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

30 U.S.C. § 1293(a) (1982). Section 703(b) provides that any employee who believes that he has been discriminated against by any person in violation of section 703(a) may apply to the Secretary of the Interior for a review of such alleged discrimination. For purposes of SMCRA, the term "person" is defined at section 701(19) as follows: "(19) 'person' means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(19) (1982). Thus, the statutory definition of a "person" does not embrace a governmental agency.

Reference to the regulations promulgated pursuant to the Act discloses the following definition:

Person means an individual, Indian tribe when conducting surface coal mining and reclamation operations on non-Indian lands, partnership, association, society, joint venture, joint stock company, firm, company, corporation, cooperative or other business organization and any agency, unit, or instrumentality of Federal, State or local government including any publicly owned utility or publicly owned corporation of Federal [,] State or local government.

30 CFR 700.5. Although the original regulatory definition of "person" embodied the same language as the statutory definition, 4/ the definition was expanded in 1979 to include governmental agencies. 44 FR 15314 (Mar. 13, 1979). One reason given for the expanded definition is that governmental agencies are subject to regulation under the Act pursuant to section 524, 30 U.S.C. § 1274 (1982), when engaged in surface coal mining and reclamation operations. 44 FR 14912 (Mar. 13, 1979). The preamble to the regulatory revision relates a further reason for expanding the definition of a "person":

The Act mandates the involvement of and close coordination among many different agencies. Various agencies play important roles in the abandoned land's [sic] program in Title IV of the Act, in the regulatory process in terms of providing data, permit application reviews, performance standards compliance, and in designation of lands unsuitable for all or certain types of surface coal mining operation. * * *

OSM [Office of Surface Mining] believes the involvement of other State and local agencies, which the Act specifies, establishes an interest on the part of those agencies in actions taken by the regulatory authority under State programs, particularly actions relating to permits and designations. Therefore, OSM believes that inclusion of the government agencies in the definition of "person" is justified. OSM does not intend by this to expand upon an agency's capacity to sue or be sued where the Act does not clearly indicate that the agency has an interest in the actions being taken. In such situations, existing principles of State or Federal law would govern.

44 FR 14912 (Mar. 13, 1979). Thus, a further reason for the expanded definition is to allow the participation of interested State and local governmental agencies in proceedings before the regulatory authority.

Leber argues that the extension of the regulatory definition of person to include any agency of state government encompasses PDER for purposes of an

4/ 30 CFR 700.5, 42 FR 62676 (Dec. 13, 1977).

employee protection action under the Act. Leber finds no constraints on the definition of person. Both PDER and the Solicitor point to the explanation provided by the Department in the preamble, quoted above, as supporting a construction that the definition of person was expanded for only limited purposes.

We agree with PDER and the Solicitor and find that in this case PDER is not a person for purposes of an employee protection proceeding under 30 U.S.C. § 1293 (1982). Clearly, the intent of the regulations was to consider an agency, such as PDER, a "person" to the extent it might be conducting surface coal mining operations under the Act or to the extent it might be involved in those functions highlighted in the preamble, i.e., abandoned lands program, the regulatory process in terms of providing data, permit application review, performance standards compliance, and designation of lands unsuitable for all or certain types of surface coal mining operations. 44 FR 14912 (Mar. 13, 1979).

There is no indication that the Department intended to create a new forum whereby state employees could seek review of actions taken by the state with regard to state employment practices. 5/ It appears that the intent of Congress in enacting 30 U.S.C. § 1293 (1982) was to encourage employees of those persons involved in surface coal mining operations to come forward to report violations of the Act while at the same time offering protection to the employee.

5/ A state employee may pursue alleged discriminatory acts in existing forums, i.e., state civil service commissions and state courts, as well as through remedies afforded by other Federal laws for the redress of discrimination. See, e.g., 42 U.S.C. § 1983 (1976).

The regulations in 30 CFR support the conclusion that PDER is not a "person" subject to the provisions of 30 U.S.C. § 1293 (1982). Section 865.11(b) of 30 CFR requires that "[e]ach employer conducting operations which are regulated under this Act shall within 30 days from the effective day of these regulations, provide a copy of this part to all current employees and to all new employees at the time of their hiring." (Emphasis added.) The key phrase is that emphasized. The Department was concerned that all employees guaranteed protection under the Act should be aware of their rights. Thus, employers "conducting operations which are regulated under this Act" are required to provide the regulations to their employees. Regulated operations under the Act are surface coal mining operations. 30 U.S.C. § 1291(28); 30 CFR 700.5. The inescapable conclusion is that a "person" under 30 U.S.C. § 1293(a) is an employer who conducts surface coal mining operations. PDER is not such a person. ^{6/} For the reasons stated above, the Board concludes that the motion to dismiss filed by PDER should have been granted.

In light of this holding, we find it unnecessary to consider arguments raised concerning the effect of the Tenth Amendment on the statutory language.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the interlocutory

^{6/} Only when a state itself is engaged in surface coal mining operations is it subject to regulation under the Act. 30 U.S.C. § 1274 (1982).

ruling appealed from denying appellant's motion to dismiss is reversed. The case is remanded to the Hearings Division for action consistent with this decision.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

